Supreme Court, U.S.
FILED
MAY 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1620

In the Supreme Court of the United States

OCTOBER TERM, 1989

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., NATIONAL ASSOCIATION OF CASUALTY AND SURETY AGENTS, NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS, NEW YORK STATE ASSOCIATION OF LIFE UNDERWRITERS, INDEPENDENT INSURANCE AGENTS OF NEW YORK, INC., and THE PROFESSIONAL INSURANCE AGENTS OF NEW YORK, INC.,

Petitioners,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM and MERCHANTS NATIONAL CORPORATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT MERCHANTS NATIONAL CORPORATION

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QUESTION PRESENTED

Whether § 4 of the Bank Holding Company Act prohibits a bank owned by a holding company from engaging in activities authorized for banks by the bank's chartering authority.

RULE 29.1 LISTING

Merchants National Corporation has no parent company or any non-wholly owned subsidiaries.

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STATEMENT

The order of the respondent Board of Governors of the Federal Reserve System ("Board") at issue grants an application by Merchants National Corporation ("Merchants"). (Pet. App. 22a-45a). In the proceeding to review the Board's order brought by the petitioners Independent Insurance Agents of America, Inc., et al. ("Insurance Agents"), Merchants was granted leave to intervene by the Court of Appeals for the

Second Circuit ("Second Circuit") and appeared as intervenor to argue that the petition for review should be denied. As intervenor below, Merchants is automatically a party to the proceedings in this Court. Sup. Ct. R. 12.4. Merchants submits this brief in opposition to the Insurance Agents' petition for a writ of certiorari to review the Second Circuit's decision.[1]

REASONS FOR DENYING THE WRIT

The Petition claims (1) that § 4 of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1843, precludes a state-chartered bank owned by a bank holding company from engaging in insurance agency activities authorized for banks by the bank's chartering authority, and (2) that the decision below presents some major issue regarding the proper methodology for judicial review of administrative agency interpretations of federal statutes. The Petition is wrong.

As this Court has taken pains to explain, the first and only task on judicial review is to give effect to the "unambiguously expressed intent of Congress" where that intent is discernible on the face of the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Only if the statute is ambiguous or silent on the issue need the court go further and inquire if the agency's "construction" is a "permissible" one. 467 U.S. at 843.

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[1] Although labelled "Intervenor" in the caption of the Petition for Certiorari, Merchants should have been named a "Respondent" and properly appears as such before this Court. *Id.*; *see* R. STERN, E. GRESSMAN & S. SHAPIRO, SUPREME COURT PRACTICE 344, 348-49 (6th ed. 1986).

In this case, the Second Circuit upheld the Board's construction of § 4 as permissible on the premise that the words of the statute did not specifically resolve the issue presented. That decision is clearly correct if the premise is assumed. In fact, however, there was no need to proceed to the second stage of the inquiry under *Chevron*. The plain and unambiguous words of § 4 affirmatively establish that it does not regulate the activities of subsidiary banks. Both that section and the structure of the entire Act clearly show that the Board has no statutory authority to prevent a holding company's acquisition of a bank based on the activities in which the bank is engaged.

The Second Circuit's decision thus upholds a Board order that comports with and is compelled by the explicit terms of the statute. The decision is correct, conforms with prior decisions of this Court, does not conflict with any decision of any other federal court, and does not warrant further review.

I. *BOTH THE PLAIN LANGUAGE OF § 4 AND THE STRUCTURE OF THE ENTIRE ACT SHOW THAT § 4 DOES NOT REGULATE THE ACTIVITIES OF BANKS.*

The Bank Holding Company Act was adopted against the background of Congress' historic commitment to the dual banking system in this Nation. Under that system, national banks are chartered pursuant to, and their powers defined by, the National Bank Act, 12 U.S.C. §§ 1 *et seq*. State banks, by contrast, are chartered under and their powers defined by state statutes and regulations. The "primary supervisor" of national banks with plenary authority to govern their activities is the Comptroller of the Currency, not the Board. The primary super-

visors of state banks are state officials and agencies acting under state law.[2]

In enacting the Bank Holding Company Act and giving the Board supervisory authority over bank *holding companies*, Congress did not alter this dual banking system or the allocation of supervisory authority over *banks* and *banking activity*. "Underlying the [Bank Holding Company Act] as a whole" were the "broad[] purposes" to "retain local, community-based control over banking." *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 172 (1985). The Act therefore does not purport to define the powers of banks or to regulate banking activities according to a uniform federal standard of what banks "ought to do."

Rather, the Bank Holding Company Act begins by distinguishing between a "bank holding company" on the one hand, and a "bank" on the other. 12 U.S.C. § 1841(a)-(c). Section 3 of the Act then sets forth the terms and conditions under which a bank holding company may acquire and control a bank. 12 U.S.C. § 1842. Section 3(c) specifies in detail the factors the Board must consider in passing on an acquisition application. None permits the Board to deny an application based upon the powers the bank itself is authorized to exercise pursuant to its charter under state or federal law. *See* 12 U.S.C. § 1842(c).

Section 4 of the Act, by contrast, does not regulate a holding company's acquisition and control of banks. Rather, § 4 ad-

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[2]Even with respect to state banks insured by the Federal Deposit Insurance Corporation ("FDIC"), the Board is the primary federal regulator for *that* purpose only of those banks which are members of the Federal Reserve System; for the vast majority of insured state banks, the primary federal regulator is the FDIC. *See* Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 3-7 (1977).

dresses a bank holding company's ownership and control of *non*banking subsidiaries and its engagement in activities *other than* owning and managing banks. Although § 4 is lengthy, its plain language makes clear that it imposes *no* restriction on the kinds of banks that a holding company may own. The section provides in pertinent part:

> § 1843. Interests in nonbanking organizations.
>
> Ownership or control of voting shares of any company not a bank; engagement in activities other than banking.
>
> (a) Except as otherwise provided in this chapter, no bank holding company shall --
>
> (1) . . . acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or
>
> (2) . . . retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this chapter or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section . . . .
>
> Exemptions
>
> (c) The prohibitions in this section shall not . . . apply to --
>
> . . . .
>
> (8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto, but for purposes of this subsection it is not closely related to banking or managing or controlling banks for a bank holding company to pro-

> vide insurance as a principal, agent, or broker except [as stated in (A) through (F) and subsequent proviso] . . . .

12 U.S.C. § 1843(a),(c).

As that plain language shows, the only prohibitions in § 4 are stated in subsection (a). The entirety of subsection (c), including (c)(8) upon which the Insurance Agents rely, is devoted to listing *exemptions* to the prohibitions otherwise stated in subsection (a). Subsection (c)(8) itself generally permits the Board to *allow* otherwise prohibited ownership of *non*bank companies if it determines that their activities are "so closely related to banking or managing or controlling banks as to be a proper incident thereto . . . ." The subsequent "insurance" limitations in subsection (c)(8) are not independent "prohibitions" but rather are *limitations on the exemption* -- *i.e.*, limitations on the Board's authority to *expand* the permissible scope of bank holding company activity in areas "closely related to banking or managing or controlling banks . . . ."[3]

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[3]This meaning of § 4(c)(8) is confirmed by a careful parsing of the statutory language. Section 4(c) generally provides that "*[t]he prohibitions* in *this section* shall *not . . . apply* to -- . . ." (emphasis added). "[T]his section" is § 4. "The prohibitions" in "this section" are not stated in § 4(c) -- rather, they are set forth in § 4(a). Subsection 4(c) states a variety of "exemptions" to those § 4(a) prohibitions, including the several exemptions set forth in (c)(1) through (c)(14). The exemption stated in subsection (c)(8), like each of (c)(1) through (c)(14), applies to the "shares of any company . . . ." Those "compan[ies]," to which "[t]he prohibitions in this section shall not . . . apply", can only be the *non*bank companies whose shares a holding company would otherwise be prohibited by § 4(a) from owning or controlling -- *i.e.*, in the words of § 4(a)(1)-(2), "any company which *is not a bank*" (emphasis added). Similarly, the provision in § 4(c)(8) that insurance activities are not "closely related to banking" is express-

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The exercise of Board authority to expand the scope of permissible holding company activity -- *i.e.*, to create an exemption from § 4(a)'s prohibitions -- is not the issue in this case. Rather, the question presented here is whether holding companies are prohibited from owning or controlling banks that engage in activities permitted by the bank's chartering authority. That question turns *solely* on the terms of subsection (a), and that subsection contains no such prohibition.

To the contrary, careful examination of subsection (a) reveals three -- and only three -- prohibitions:

First, "no bank holding company shall -- (1) . . . *acquire* direct or indirect ownership or control of any voting shares of any company *which is not a bank* . . . ." 12 U.S.C. § 1843(a)(1) (emphasis added).

Second, "no bank holding company shall . . . (2) . . . *retain* direct or indirect ownership or control of any voting shares of any company *which is not a bank* or bank holding company . . . ." 12 U.S.C. § 1843(a)(2) (emphasis added).

Third, "no bank holding company shall . . . (2) . . . *engage in any activities* other than (A) those of *banking or of managing or controlling banks* and other subsidiaries authorized under this chapter . . . *and* (B) those permitted under [§ 4(c)(8)]." *Id.* (emphasis added). This third prohibition directly parallels the first two in relevant part. The first two prohibitions *do* permit a holding company to acquire and retain control of *banks* and the third explicitly permits the holding company to "engage in" the activity of "managing or controlling" those same banks.

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ly limited to the Board's *exemption* authority under § 4(c)(8) -- *i.e.*, in the words of the statute, "for purposes of *this subsection* . . ." 12 U.S.C. § 1843(c)(8) (emphasis added).

A holding company necessarily engages in the activity of "managing or controlling banks" when it manages or controls entities that are "banks" as defined by the Act.[4] Neither § 4(a) nor any other provision of the Act goes beyond the minimum statutory definition of a "bank" to define what constitutes *the business of "banking"*. Only a bank's *chartering authority* defines the business of "banking" -- it does so by enumerating the authorized powers and activities of banks. Nothing in § 4 (or any other section of the Act) provides otherwise.

Thus, the plain language of § 4(a)(2)(A) is dispositive of the issue in this case. That subsection permits a holding company, independent of and unmodified by *any* limitation or condition, to engage in the activity of "managing and controlling banks".

The Insurance Agents suggest that a bank holding company is "engaged" in whatever activity its subsidiaries are engaged, including its bank as well as its nonbank subsidiaries. (*See* Pet. 15). No provision of the statute so states and, indeed, § 4 is carefully drafted to avoid that result. Section 4(a) *distinguishes* between a bank holding company's "acquir[ing]" and "retain[ing] *direct or indirect* ownership or control . . . of any company which is not a bank" on the one hand, and the holding company's own "engag[ing]" in "activities" on the other. The

[4]Under the Act and subject to certain exceptions, an entity is a "bank" if it is either "[a]n insured bank as defined in section 3(h) of the Federal Deposit Insurance Act" or "[a]n institution organized under the laws of the United States, any State of the United States [or various U.S. territories] which both - (i) accepts demand deposits or deposits that the depositor may withdraw by check or similar means . . .; and (ii) is engaged in the business of making commercial loans." 12 U.S.C. § 1841(c). As this Court has held, the Board has *no* authority to revise the Act's definition of a "bank". *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

"direct or indirect" provisions modify *only* a holding company's prohibited acquisition and retention of *ownership of a nonbank*; they prevent holding companies from acquiring or retaining control of nonbanks directly or through one or more (otherwise exempted) nonbank subsidiaries. There is *no* "direct or indirect" provision modifying the "activity" in which a holding company itself may "engage", as one would expect from the context had Congress intended the "engage[ment in] activities" prohibition to include the activities of its subsidiaries.

More generally, the Insurance Agents' purported construction of § 4's term "engage" gives no content to and would read out of the statute any distinction between (1) a holding company's acquisition and retention of nonbanks and (2) a holding company's engagement in activities. It would make § 4's structure futile and wholly unnecessary. Under the Insurance Agents' theory that a holding company "engages" in whatever activity its subsidiaries, bank as well as nonbank, engage, all Congress had to do was provide that "no bank holding company shall engage, directly or indirectly, in activities other than" some prescribed list of activities in which Congress wanted bank holding companies and their subsidiaries to engage. That is not the statute Congress enacted.

The Insurance Agents also say that a holding company cannot own a bank subsidiary which engages in an activity not permitted by § 4(c)(8) because that subsection is "incorporated by reference into Section 4(a)(2)". (Pet. 15). In fact, § 4(c)(8) is *not* "incorporated" into § 4(a)(2)(A) -- which authorizes a holding company to engage in the activity of "managing or controlling banks". The latter provision is unqualified and disposes of this case. When § 4(a)(2) refers to § 4(c)(8) activities, it explicitly provides that the permissible activities for

holding companies include *both* "(A) banking or . . . managing or controlling banks . . ., *and* (B) [the activities] permitted under [subsection (c)(8)]." 12 U.S.C. § 1843(a)(2) (emphasis added).

The statute does not say that the activities in which a holding company is permitted to "engage" are "those of managing or controlling banks *but only to the extent allowed*" -- or "only as permitted" -- by subsection (c)(8). Indeed, such statutory language, and therefore the Insurance Agents' purported "construction", would not even make sense. The activities "permitted under" subsection (c)(8) are *not* those which constitute "banking or managing or controlling banks," but rather are *additional* activities that the Board determines are "*closely related*" to "banking or managing or controlling banks". In making that "closely related" determination, the Board must necessarily look to other laws to define what activities *are* "banking" because the Bank Holding Company Act does not. The Board's reference must be to the law under which banks are organized and their permissible powers and activities defined, that is, the chartering authorities of the banks themselves.[5]

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[5]Section 4(a)(2)'s "incorporation" of § 4(c)(8) -- *i.e.*, the cross reference to § 4(c)(8) in § 4(a)(2)(B), *not* § 4(a)(2)(A) -- parallels for the holding company's own operations the § 4(c)(8) exemption for its nonbank subsidiaries. Where the Board determines that a particular activity is "closely related" to banking or managing or controlling banks, § 4(c)(8) allows the holding company to own nonbank subsidiaries engaged in that activity and § 4(a)(2)(B) "permit[s]" the holding company to engage in the same "activit[y]" directly. Subsections 4(a)(2)(A) and 4(c)(1) reflect a similar parallelism. *Compare* 12 U.S.C. § 1843(a)(1)(A) *with* 12 U.S.C. § 1843(c)(1)(C).

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In sum, the "insurance" restrictions in § 4(c)(8) are -- and are only -- restrictions on the Board's authority to grant exemptions to the prohibitions imposed by § 4(a) in the first place. Section 4(a) imposes *no* prohibition on a holding company's ownership of a *bank* of any kind, including one engaged in insurance activities. Furthermore, § 4(a)(2)(A) explicitly authorizes a holding company to "engage" in the "activity" of "managing or controlling banks" unmodified by *any* restriction or condition. It makes no grammatical sense and does violence to the plain meaning of the statutory language to contend that the insurance limitations on the § 4(c)(8) exemption constitute restrictions on *bank* activities.

Although the Insurance Agents and their political allies have repeatedly urged Congress to enact legislation regulating the activities of banks owned by holding companies, "[t]he short answer is that Congress did not write the statute that way". *United States v. Naftalin*, 441 U.S. 768, 773 (1979). The Insurance Agents' efforts to have the courts create a statutory prohibition, based on quite selective views of the "purposes" of the Act, such as "separat[ing] the banking industry from general commercial activities" unmodified by context (Pet. 6), should be summarily dismissed. As this Court only recently held under this Act:

These provisions further demonstrate Congress' determination to distinguish between the activities of (1) a bank; (2) a bank holding company; and (3) a holding company's nonbank subsidiary. Such parallel provisions, stating separately the activities in which a holding company may "engage" and the character of the nonbank subsidiaries it may own (based upon their engagement in the same activities), would be completely unnecessary if a holding company were deemed to "engage" in those activities in which its subsidiaries engage.

> The "plain purpose" of legislation . . . *is determined in the first instance with reference to the plain language of the statute itself*. . . . Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its members may differ sharply on the means ofor effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.
>
> . . . .
>
> If the Banking Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the Board or the courts, to address.

Board of Governors v. Dimension Financial Corp., 474 U.S. 361, 373-74 (1986) (emphasis added; citations omitted).[6]

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[6]It is particularly silly to suggest that judicial re-writing of the Bank Holding Company Act is necessary to prohibit abusive "tying" arrangements. (Pet. at 7, 10-11). Another federal statute, 12 U.S.C. §§ 1971 *et seq.*, directly prohibits such activities, a prohibition enforceable by civil penalities imposed by the applicable banking supervisor, injunctive actions by the Attorney General, and private actions for treble damages and attorney fees. 12 U.S.C. §§ 1972(2)(F)(i), 1973, 1975. Further, that statute, which (1) traces to the same 1970 legislation that amended the Bank Holding Company Act and (2) explicitly applies to

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II. *THE PLAIN MEANING OF § 4 IS CONFIRMED BY THE PURPOSES OF THE ACT.*

The bulk of the Insurance Agents' Petition has little to do with the actual language of § 4 but rather advances "policy" considerations based on the supposed "purposes" of the Bank Holding Company Act. (*See generally*, Pet. 8-12, 15-17). Properly considered, the statutory purposes do not conflict with but rather confirm the scope and limits of the prohibitions established by § 4(a).

When the Bank Holding Company Act was enacted in 1956, banks and the activities in which they could engage were already extensively regulated by the laws under which the banks were organized -- state laws in the case of state-chartered banks and federal law in the case of banks chartered under the National Bank Act. However, the development of bank holding companies had created a means by which a bank's parent company and the parent's non-bank subsidiaries could engage in many types of unrelated activity free of regulation. The Bank Holding Company Act was passed for the explicit purpose of limiting those *unregulated* holding company activities which *inter alia* permitted the circumvention of state banking law and regulation. *See* H. R. Rep. No. 609, 84th Cong., 1st Sess., at 2-4 (1955); S. Rep. No. 1095, 84th Cong., 1st Sess., at 2 (1955).

A purpose to regulate or prohibit these unregulated activities of holding companies does not imply a further purpose to regulate or prohibit the already regulated activities of subsidiary banks. As even the Insurance Agents must recognize, Congress' focus was on the holding company itself -- an entity

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"*banks*" as well as bank holding companies, shows that Congress knew perfectly well how to write legislation to regulate the activities of subsidiary banks when it wished to do so.

which otherwise could, through its ownership of a bank, "*combine* banking and non-banking activities within a single corporate structure." (Pet. 6; emphasis aded). The "congressional policy" underlying § 4 was to prevent "control of banking and nonbanking *enterprises* by a single business entity." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 46 (1980) (emphasis added).

That policy is not implicated when, as here, a *bank* owned by a holding company engages in activities *authorized for banks* by the bank's chartering authority and primary supervisor. In that circumstance, the involvement of the holding company does *not* create any "combination of activities" that would not otherwise be present. In terms of the facts of this case, the two state banks involved already engaged in insurance agency activities -- and did so under longstanding Indiana law -- before they were acquired by Merchants.

Thus, the scope and limits of § 4 established by the plain statutory language -- *i.e.*, prohibiting and regulating activities by holding companies and their nonbank subsidiaries, but specifically authorizing holding companies to manage and control banks, with no restrictions on their ability to do so -- conforms precisely with the congressional purpose. Congress implemented its policy against "combination of activities" by filling the perceived gap in the regulatory structure. It regulated the formerly unregulated entity (the holding company and its nonbank subsidiaries); it had no need to and did not go further and impose additional regulation on the already-regulated subsidiary banks.[7]

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[7]Although the Insurance Agents imply that this leaves the Bank Holding Company Act open to evasion by "intracorporate maneuvering" (Pet. 6), they identify no way in which this can actually occur. State and federal banking laws regulate the activities in which the banks may engage, and the Bank Holding Company Act regulates those in

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By contrast, the Insurance Agents' contrary "construction" of § 4 would result in a major reallocation of supervisory responsibility over banks and a drastic expansion of federal regulation to the detriment of state law. As the Insurance Agents recognize (Pet. 9), the jurisdictional issue of the Board's authority does not merely involve insurance agency activities authorized for banks but many others as well. Under their view

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which the holding company and its other, nonbank subsidiaries may engage. Neither matter is within the control of the holding company.

Moreover, the Act repeatedly draws distinctions based on the corporate forms. For example, § 5 of the Act, 12 U.S.C. § 1844, gives the Board authority to order a holding company or its *nonbank* subsidiaries to terminate activities in certain circumstances. In those same circumstances, the Board is also authorized to require divestiture by the holding company of ownership or control of an offending *nonbank* subsidiary. However, no authority is given to the Board to order a *bank* subsidiary to terminate any activity, regardless of the potential risk entailed; nor is any authority given to require divestiture of a bank subsidiary in any circumstance. *See* 12 U.S.C. § 1844(e)(1). *See also, e.g., Cameron Financial Corp. v. Board of Governors*, 497 F.2d 841 (1974) (application of § 4(a)'s grandfather clause depends upon whether a bank or a nonbank subsidiary was conducting the activity before the effective date).

The Insurance Agents also say the Board is inconsistent in interpreting the § 4(a) prohibitions to apply to the nonbank subsidiaries of banks. (Pet. 5, 17). No issue regarding nonbank subsidiaries of banks is presented in this case and, as the Second Circuit noted, resolution of that issue of the Board's authority is properly left to a case which presents it. (Pet. App. 15a). In any event, the Board's recent reversal on the issue of nonbank subsidiaries of banks -- *see, e.g.*, Pet. App. 42a-43a (discussing former Regulation Y); *American Bancorp, Inc.*, 39 Fed. Reg. 22468 (1974); *Piedmont Carolina Financial Services, Inc.*, 59 Fed. Res. Bull. 766, 767-68 (1973) -- provides no legal basis for overriding the plain statutory language in the case of banks themselves.

of § 4, the Board, rather than the Comptroller in the case of national banks and state law and regulatory agencies in the case of state banks, would determine the activities in which banks may engage in the guise of making § 4(c)(8) "exemption" decisions.[8]

Such a drastic expansion of federal law to the detriment of the States is not lightly presumed, and should never be assumed absent clear statutory language showing that was Congress' intention. Doing so would be particularly inappropriate in this case. The pertinent provisions of § 4(a) were enacted over *40 years ago*, they have *never* been amended in any relevant respect, and the Board has *never* construed that language as giving it regulatory authority over the activities of banks. (*See* Pet. App. 33a-34a). Thus, for example, the Board's regulation implementing the § 4(c)(1) exemption for nonbank subsidiaries, 12 U.S.C. § 1843(c)(1), provides that:

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[8]No reading of § 4 could restrict this expansion of Board authority to the "insurance" limitations contained in § 4(c)(8), and the Insurance Agents do not pretend otherwise. If banks owned by holding companies were limited to activities the Board determines are "closely related" to banking under § 4(c)(8), that limitation would necessarily extend to any and all areas of bank powers and activities.

The Court should not underestimate the magnitude of the expansion of federal law this would entail. Information presented by the Indiana Department of Financial Institutions to the Second Circuit showed that of 237 banks chartered under Indiana law, 179 were owned by a holding company. *Brief Of The Indiana Department Of Financial Institutions As Amicus Curiae In Support Of Respondent* at 4, Second Circuit No. 89-4030. Thus, with respect to over 79% of the state banks in Indiana, the law governing and regulatory authority over a presently indeterminable number of bank activities would pass from State into Federal hands.

> The Board has ruled heretofore that the term "services" as used in section 4(c)(1) is to be read as relating to those services . . . which a bank itself can provide for its customers . . . . *A determination as to whether a particular service may legitimately be rendered or performed by a bank for its customers must be made in the light of the applicable Federal or State statutory or regulatory provisions. In the case of a State-chartered bank, the laws of the State in which the bank operates, together with any interpretations thereunder rendered by appropriate bank authorities, would govern the right of the bank to provide a particular service.* In the case of a national bank, a similar determination would require reference to provisions of Federal law relating to the establishment and operation of national banks, as well as to pertinent rulings or interpretations promulgated thereunder.

12 C.F.R. § 225.118(c) (1990) (emphasis added). This regulation, which interprets the scope of § 4 of the Act in the relevant respect, was promulgated in 1964. *See id.* Congress has never acted to overrule it.

The Insurance Agents' purported "construction" of § 4 is not supported by the authority to prevent "evasions" of the Act claimed by the Board in *Citicorp (South Dakota)*, 71 Fed. Res. Bull. 789 (1985). (Pet. 17). The Board asserted authority in that case under § 5 of the Act. 71 Fed. Res. Bull. at 790 n.3. After this Court's decision in *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361 (1986), the Board authority asserted in *Citicorp* is in serious question. (*See* Pet. App. 8a n.2). But in any event, whether or not the Board has the authority under § 5 it claimed in *Citicorp*, that would not show that the Board has authority under § 4 to regulate the activities

of banks; and the plain language of the statute shows the opposite.[9]

Finally, the Insurance Agents' position is not supported by their misleading characterization of *Board of Governors v. Investment Company Institute ("ICI")*, 450 U.S. 46 (1981). To the contrary, that case refutes their position. *ICI* involved a Board regulation under § 4(c)(8)'s "closely related to banking" exemption that allowed a holding company (or a nonbank subsidiary) to act as an organizer, sponsor and investment advisor for a closed-end investment company. In upholding the regulation, this Court rejected the claim that the Board's regulation would impermissibly allow *banks* owned by holding com-

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[9]Furthermore, the facts of this case are not remotely similar to those in *Citicorp*. The state statute in that case, enacted in 1984, permitted an out-of-state holding company to acquire a single South Dakota bank. It simultaneously placed severe restrictions on such a bank's engagement in both banking and insurance activities within South Dakota. 71 Fed. Res. Bull. at 789. Thus, the Board could infer that the purpose of that statute and Citicorp's proposed acquisition thereunder was to allow a bank holding company to evade the purposes of the Act by permitting it to engage in an out-of-state insurance business. *Id.* at 790.

Here, by contrast, the Indiana legislature long ago determined it to be in the public interest for Indiana banks to compete in the area of insurance agency activities other than life insurance. IND. CODE § 28-1-11-2 (1988). This statutory authorization traces to the Financial Institutions Act of 1933, and that enactment confirmed bank practices under prior Indiana law. The Anderson Banking Company, for example, has engaged in such insurance activities since its incorporation in 1916. (Pet. App. 67a-68a n.2). This state law authorization applies to all Indiana-chartered banks, and it long preceded the Bank Holding Company Act of 1956. Accordingly, its "purpose" was *not* to create some peculiar new form of "bank" permitting a holding company to evade the restrictions imposed by federal law.

panies to engage in that activity. The Court held that "*the Board does not have the power to confer such authorization on banks*," and then quoted with approval the Board's interpretation of its authority under the Act:

> The authority of national banks or state member banks to furnish investment advisory services does not derive from the Board's regulation; *such authority would exist independently of the Board's regulation and its scope is to be determined by a particular bank's primary supervisory agency.*

450 U.S. at 59 n.25 (emphasis added). Thus, this Court recognized (1) that § 4(c)(8) applies only to holding companies and their nonbank subsidiaries, *not* to banks; and (2) that the authorized activities of banks exist independently of the Act and derive from their chartering authorities.

Confronted with that holding in *ICI*, the Insurance Agents say that the Court's footnote "goes on to uphold" restrictions on banks that prevented holding companies from evading the Act and that this "sort of evasion is exactly what is at issue here." (Pet. 18 n.10). In fact, the "restrictions" imposed by the Board's ruling did *not* restrict banks from engaging in their *own* investment advisory activities if and as permitted by their chartering authority.

Rather, the Board's regulation and interpretative ruling, which permitted holding companies (and their nonbank subsidiaries) to engage in such activities, at the same time placed certain restrictions on the manner in which that activity could be conducted. The restrictions on banks to which the Insurance Agents refer simply prohibited banks from performing certain subsidiary functions to assist or promote the *holding company's* investment advisory activity in ways similar to those prohibited

to the holding company itself.[10] As this Court noted, those restrictions applied "to banks *when the investment advisory function was performed by a holding company or its nonbanking subsidiary*" in order to prevent "evasion" of the similar restrictions placed on those entities. 450 U.S. at 60 n.25 (emphasis added). There were no restrictions on banks performing investment advisory functions themselves (or upon the manner in which they conducted those activities), the authority for which "would exist independently of the Board's regulation and its scope [would be] . . . determined by a particular bank's primary supervisory agency." *Id.* at 59 n.25.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10]For example, the holding company could not "engage directly or indirectly, in the sale . . . of securities of any investment company for which it acts as investment advisor." 450 U.S. at 53 n.13. Therefore, the subsidiary bank employees could not "express . . . opinion[s] with respect to the advisability of purchase of securities of any investment company for which the *holding company* acts as advisor." *Id.* (emphasis added).